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Leutner v. Garbuz

Leutner et ux. v. Garbuz and Zottenberg

Alberta Supreme Court

Kirby J.

Judgment: September 17, 1970

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Counsel: G. S. D. Wright, for plaintiffs.

H. I. Shandling, for defendants.

Subject: Civil Practice and Procedure

Practice --- Judgments and orders -- Res judicata and issue estoppel -- Res judicata -- Doctrine of merger.

Estoppel -- Plea of res judicata -- Action in rem -- Issue which might have been raised in first action sought to be introduced in second.

Plaintiff wife was the registered owner of a parcel of land which had been mortgaged by her first husband, since deceased. In 1960 she married first plaintiff and the couple had lived on the land since that time. In 1963 she executed a transfer of the land, foreclosure proceedings having been commenced, in favour of defendants and in consideration of a sum sufficient to pay off the mortgage and accrued interest; some days later she executed a second transfer in which the cash consideration was increased to include unpaid taxes; on this document the dower affidavit was signed but the commissioner's signature was lacking. A dispute arose as to the true nature of the transaction and was litigated; Sinclair J. found in favour of the defendants, to whom title had issued following registration of the first transfer. Plaintiffs now sought to set up the second transfer as superseding the first and argued that the second transfer could not be registered because The Dower Act, R.S.A., 1955, c. 90, had not been complied with.

Held that the action tried by Sinclair J. was an action in rem since it was clearly determinative of the status of the ownership of the lands in question; the fact that the question of the dower rights of the plaintiff husband was not raised in that action could not now avail the plaintiffs since this was an issue which could have been raised in the first action, and which properly belonged to the subject matter of that litigation. It followed that the defendants' plea of estoppel based on res judicata must prevail, and the action must be dismissed: Hill v. Hill (1956), 56 W.W.R. 260, 57 D.L.R. (2d) 760 applied.

EXHIBIT 3

[1971] **1 W.W.R. 436**, 14 D.L.R. (3d) 367

Kirby J.::

1 The following facts have been agreed upon:

(1) The female plaintiff was previously married to one Wangler, who died in 1959. Between then and 16th November 1960, when she married the plaintiff husband, she was single.

(2) In 1953 Wangler had mortgaged the S.E. 1/4 of s. 14, tp. 53, rge. 27, W. 4 M., reserving unto Her Majesty all mines and minerals, which is a quarter section of land near Spruce Grove, Alberta, to a Mr. Wesley for $2,000 and had never paid anything on the mortgage. In 1960 foreclosure proceedings were commenced and were in their final stages by early 1963.

(3) At the beginning of April 1963, the defendants agreed to pay off the mortgage in consideration of a transfer to them of the land, and other consideration.

(4) On 16th April 1963 the plaintiff wife executed a transfer in favour of the defendants, expressed to be in consideration of the payment to her of $5,250.

(5) On 23rd April 1963 the plaintiff wife, following the receipt by her of a letter from the solicitor acting for her and the defendants (Mr. Solomon Estrin) asking her to contact him, executed a second transfer in favour of the defendants expressed to be in consideration of the payment to her of $6,000. Leutner was the witness to this transfer, and was present at the execution of both transfers.

(6) The reason for the second transfer was that in the meantime Mr. Estrin found that the amount necessary to clear the title to the premises included some unpaid taxes, which brought the total nearer $6,000 than $5,250.

(7) The dower affidavit on the second transfer was signed but, if sworn, the signature of the commissioner was not affixed.

(8) The defendants said that the transaction was an outright sale of the property to them with possession to be given in two years. The plaintiff wife said this was a loan secured by transfer of title and that they had two years within which to redeem without interest.

(9) This dispute was litigated in an action brought by the plaintiff wife against the defendants.

(10) This judgment was appealed. The appeal was struck off for want of prosecution. An effort was made to revive it in November 1969. The motion was denied, the Court of Appeal remarking: (a) that sufficient reason for the delay had not been given; (b) that in any case the likelihood of success on the appeal had not been demonstrated; and (c) that since the motion was lost, it was unnecessary to deal with the application to adduce further evidence.

(11) At the argument on the motion in the Appeal Court, counsel for the appellant went carefully into the alleged mistake, the subject of the present action except that he did not inform the Court that the plaintiff wife had remarried prior to the registration of the transfer dated 16th April 1963.

(12) The defendants filed a caveat on 29th April 1963, claiming an interest under the unregistered transfer of 23rd April 1963.

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(13) Mr. Estrin obtained a discharge of the Wangler mortgage from the mortgagee's solicitors about 30th April 1963 for $5,371.02.

(14) In August 1963 the amount necessary to pay off the taxes notified against the title was $515.54.

(15) The transfer of 16th April 1963 was registered on 7th February 1964 by Mr. Estrin or his firm, and title issued to the defendants.

(16) The plaintiff wife has lived on the premises at all times since 1933 and is still living there. The plaintiff husband has lived there at all times since 1960 and is still living there.

(17) The plaintiff husband does not give his consent to the transfer or other disposition by the plaintiff wife of the premises. The plaintiff wife does not and will not apply to dispense with his consent.

2 The plaintiffs contend that the second transfer superseded the first and therefore the registration of the first transfer is a nullity and should be set aside. They further contend that the second transfer cannot be registered because The Dower Act has not been complied with.

3 With respect to the first contention it was argued that it was detrimental to the wife to raise the issue of the wrong transfer being registered, since her position was that the transaction was a mortgage in which the registration of the transfer was not contemplated.

4 In this connection reference was made to Spencer-Bower and Turner on Res Judicata, 2nd ed., wherein it is stated at pp. 165-6:

> 199. When it is laid down, as it is in the earlier cases, that a general adverse decision imports also a particular adverse decision on any traversable allegation made by the successful party which his opponent has omitted to traverse, it is important to note that, according to the more recent authorities, an allegation may be 'traversable', for the purposes of the rule, not only when it is express and direct, but also when it is reasonably implied. ...
>
> 200. On the other hand, where there was no duty on the party to raise the question at issue, or to set up the case, which in fact he did not bring to the notice of the tribunal, or where he could not have done so without detriment, or the reasonable possibility of detriment, to his legal position or interests, a general decision against him does not necessarily involve an adverse decision on that particular question, issue, or case. ... and, generally, the omission of a party to plead affirmative matters which if pleaded, would not have conflicted with any traversable allegation made on the other side, such matters, for example, as release, confession and avoidance, and the like, does not entitle the opposite party to treat a general judgment in his favour as a decision in his favour on the particular affirmative matter.

5 Sinclair J., the trial Judge in the first action, did consider the matter of there being two transfers and the wrong one being registered, and although he made no express finding with respect to the validity of the registration of the second transfer, he made a declaration that the transaction between the parties was an absolute sale of the land and gave an order that the defendants were entitled to possession.

6 The fact that the trial Judge, having taken into consideration the matter of there being two transfers, then made this declaration and gave this order, implies the validity of the transfer which was registered and so disposes of that issue.

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7 The defendant raises estoppel as a defence on the ground of res judicata.

8 Whether or not estoppel lies is determined by whether the first action was in personam (inter partes) or in rem. Spencer-Bower states at p. 198:

> 225. A judicial decision *inter partes* operates as an estoppel, in favour of, and against, parties and privies only, not third persons or strangers.

9 And at p. 213:

> 245. A judicial decision *in rem* is one which declares, defines, or otherwise determines the status of a person, or of a thing, that is to say, the jural relation of the person, or thing, to the world generally, and therefore is conclusive for, or against, everybody, as distinct from those decisions which purport to determine the jural relation of the parties only to one another, and their personal rights and equities *inter se*, and which, therefore, are commonly termed decisions *in personam*.

10 The declaration of the trial Judge in the first action that the transfer between the two parties was an absolute sale of the land, and his order that the defendants were entitled to possession, is clearly a determination of the status of the ownership of these lands. As such it is a decision in rem and is therefore conclusive against everybody.

11 It is argued that the question of the dower rights of the plaintiff Kurt Heinz Leutner, the husband of the plaintiff Elsie Alma Leutner by a second marriage, joined as plaintiff by virtue of his alleged dower rights, was neither raised in the first action nor considered by the trial Judge. The learned trial Judge, in his reasons for judgment, referred to the fact that the dower affidavit was signed by the plaintiff but that, if it was sworn, the Commissioner for Oaths never affixed his signature.

12 The law applicable to the situation where an issue was not raised at the trial of an action was considered by the British Columbia Court of Appeal in *Hill v. Hill* (1966), 56 W.W.R. 260, 57 D.L.R. (2d) 760. Tysoe J.A., delivering the judgment of the Court, said at p. 263:

> The rule of law on the subject of *res judicata* was stated by Wigram, V.-C. in *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313, in these words at pp. 114-5 (Hare), p. 319 (E.R.):
>
> > ... I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> This passage was approved by the judicial committee of the Privy Council in *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155, *per* Lord Shaw, at p. 170, and by the Supreme Court of Canada *per* Cartwright J. in *Maynard v. Maynard* , [1951] S.C.R. 346, [1951] 1 D.L.R. 241. Cartwright, J. went on to quote, at p. 359, the following from Lord Shaw's speech in the *Hoystead* case:
>
> > Parties are not permitted to begin fresh litigations because of new views they may entertain of the law

> of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.
>
> If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

Lord Shaw continued at p. 166 (A.C.):

> Thirdly, the same principle -- namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties rights to rest applies and estoppel occurs.

And at p. 170:

> It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision.

13 In my opinon the foregoing rule is applicable here. The action is accordingly dismissed with costs under col. 3.

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Henderson v Henderson

(Ct of Chancery) Court of Chancery
20 July 1843

Where Reported

Summary

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Citations to the Case

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Where Reported

[1843-60] All E.R. Rep. 378

67 E.R. 313

(1843) 3 Hare 100

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Judge: Sir James Wigram V.C.

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Negative Indirect History

Distinguished by

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Securum Finance Ltd v Ashton (No.1), [1999] 2 All E.R. (Comm) 331; (1999) 96(26) L.S.G. 28; (1999) 143 S.J.L.B. 182; Times, June 18, 1999; Independent, June 28, 1999 (Ch D)

Stanway v Attorney General, Times, November 25, 1999 (Ch D)

Sweetman v Shepherd, [2000] C.P. Rep. 56; [2000] C.P.L.R. 378; (2000) 97(14) L.S.G. 43; (2000) 144 S.J.L.B. 159; Times, March 29, 2000 (CA (Civ Div))

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(2000) 150 N.L.J. 1889; (2001) 145 S.J.L.B. 29 (HL)

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